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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

MARINA POINT, LTD., a limited partnership without subsidiaries or affiliates,

Petitioner,

v.

STEPHEN WOLFSON AND LOIS WOLFSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the provisions of California law regarding the appointment of interim Supreme Court Justices violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States?

2. Did the decision of the Supreme Court of the state of California violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States by deciding the case based upon evidence not presented to the trial court without giving the petitioner the opportunity to cross-examine that evidence, by ignoring the findings of fact of the trial court and by enunciating one standard of interpretation for a state penal statute, but applying a different and vague standard to the facts of this particular case?

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STEPHEN WOLFSON AND LOIS WOLFSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Marina Point, Ltd., pursuant to the authority of 28 *United States Code*, § 1257, hereby petitions this court for a Writ of Certiorari to the Supreme Court of the State of California to review the decision of that Court in *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, 180 Cal.Rptr. 496. All parties to the court proceeding below are named in the caption. The grounds for this petition and the supporting points and authorities are set forth below.

QUESTIONS PRESENTED

1. Do the provisions of California law regarding the appointment of interim Supreme Court Justices violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States?

2. Did the decision of the Supreme Court of the state of California violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States by deciding the case based upon evidence not presented to the trial court without giving the petitioner the opportunity to cross-examine that evidence, by ignoring the findings of fact of the trial court and by enunciating one standard of interpretation for a state penal statute, but applying a different and vague standard to the facts of this particular case?

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING; JURISDICTIONAL STATEMENT.

STATEMENT OF THE CASE

This is an unlawful detainer proceeding based upon the respondent tenants' refusal to leave an apartment at the expiration of their lease. Petitioner filed an action in the Municipal Court. After trial, findings of facts and conclusions of law, the Municipal Court entered its judgment in favor of the petitioner for restitution of the premises, damages for holding over, attorney fees and court costs.

The appellate department of the Superior Court reversed the Trial Court decision and remanded for a further determination on certain specified issues. It certified its opinion for publication, thereby indicating its opinion that the case was of sufficient importance to be reviewed by a higher court.

The Court of Appeals transferred the case to itself from the appellate department of the Superior Court and affirmed the Trial Court decision in favor of petitioner. The California Supreme Court reversed the decision of the Trial Court in a decision filed February 8, 1982.

Petitioner's Petition for Rehearing was timely filed February 23, 1982. The California Supreme Court extended its time to rule on the Petition for Rehearing by thirty days and, ultimately, denied the Petition for Rehearing, entering its order for reversal of the trial court decision on April 9, 1982.

STATEMENT OF THE FACTS

The Wolfsons rented an apartment from Marina Point, Ltd. (herein "MPL"). The lease prohibited occupancy of the apartment by minors. The Wolfsons had a baby, but concealed the fact of the birth from MPL. Still concealing the fact that they had a three-month old infant living with them, the Wolfsons renewed the lease, the renewal again prohibiting occupancy of the apartment by minors. When they signed the renewal lease, the Wolfsons knew that the minors were prohibited and during the term of the lease represented to MPL that their infant was "just visiting."

Upon learning that the Wolfsons had a child living with them, MPL declined to renew the Wolfsons' lease, but did grant two short extensions of their tenancy to allow them to find a new apartment. The Wolfsons refused to move and MPL filed an action for unlawful detainer to recover possession of the premises.

The Wolfsons alleged as an affirmative defense that their exclusion violated the Unruh Civil Rights Act (*California Civil Code*, § § 51 *et seq.*). This act prohibits discrimination based upon sex, color, race, religion, ancestry or national origin, and has been interpreted by

the California Supreme Court as prohibiting all forms of arbitrary discrimination, *In Re Cox*, (1970) 3 Cal. 3d 205, at 216, 90 Cal.Rptr. 24. The full text of the relevant Civil Code sections are set forth in the appendix.

Following the trial, the trial court found, inter alia, that,

> "26. When children live at an apartment complex, they cause more damage to apartments and landscaping than adults and children are noisier and more disruptive to other tenants than adults and children cause higher maintenance costs than adults.
>
> "27. Children are rowdier, noisier, more mischievious and more boisterous than adults.
>
> "28. The facilities at Marina Point, Ltd. are designed for use by adults, not children, impose dangers to children who are not accompanied by adults.
>
> "29. The plaintiff Marina Point, Ltd.'s exclusion of children from the premises at issue herein is rationally related to the lack of facilities provided for children, to the noise and damage caused by children and proceeds from a reasonable economic motive to promote a quiet and peaceful environment free from noise and damage caused by children."

Based on these findings, the Trial Court concluded that the refusal of MPL to renew the Wolfsons' lease was not arbitrary discrimination which violated the Unruh Act.

The Trial Court rejected findings proposed by the Wolfsons to the effect that families with children are excluded from sixty percent to eighty percent of available rental housing throughout major metropolitan areas of the state. In its decision, the California Supreme Court refused to follow its usual practice that the evidence must

be interpreted most favorably to the respondent (petitioner herein) and that the inferences drawn therefrom by the Trial Court should not be disturbed on appeal, *In Re Marriage of Mix*, (1975) 14 Cal. 3d 604, at 614.

When it decided the case, the majority on the California Supreme Court included two interim justices appointed by the Chief Justice. Both of these interim justices sided with the Chief Justice as has occurred in over ninety percent of her appointments.

The issue concerning appointment of interim justices was first raised in a "Supplemental Brief in Support of Petition for Rehearing" which was lodged with the clerk of the court on March 2, 1982, during the pendency of the Petition for Rehearing. The clerk refused to "file" the supplemental brief but indicated that he would forward it to the Chief Justice.

The issue concerning denial of cross-examination and consideration by the court of evidence outside the record as a denial of due process was specifically raised in "Respondent's Reply to Appellant's Supplemental Brief and to Amici Curiae Briefs" pp. 22-28 and in "Respondent's Petition for Rehearing".

Each and every brief filed by the Petitioner in the lower courts urged the reviewing court to follow the usual rules of appellate procedure and affirm the judgment if the Trial Court's findings were supported by substantial evidence. The Supreme Court's failure to do so was identified as a specific violation of the Fourteenth Amendment due process clause in "Respondent's Petition for Rehearing".

ARGUMENT

I.

THE PROVISIONS OF CALIFORNIA LAW REGARDING APPOINTMENT OF INTERIM SUPREME COURT JUSTICES VIOLATE THE GUARANTEES OF DUE PROCESS AFFORDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The essence of procedural due process is a fair hearing in a fair tribunal, *In Re Murchison*, (1955) 349 U.S. 133, at 136, 99 L.Ed. 942, at 946. In determining that the Wisconsin Board of Medical Examiners could both investigate and adjudicate instances of medical misconduct, this court observed,

> "Not only is a biased decision-maker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.' (Citations). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." *Withrow v. Larkin*, (1975) 421 U.S. 35 at 46, 43 L.Ed. 2d 712, at 723, 95 S.Ct. 1456.

This court concluded that the combination of investigative and adjudicative functions does not, in itself, violate due process, but observed that the "special facts and circumstances" of a given case might lead to the conclusion that the risk of the unfairness was intolerably high.

This court has found that in certain situations, the risk of bias is so great that prejudice should always be presumed. This is true with respect to decision-makers who have a pecuniary interest in the outcome of the litigation, see *Gibson v. Berryhil* (1973) 411 U.S. 564, 36 L.Ed. 2d 488, 93 S.Ct. 1689, or who have been reviled by the party before them, see *Mayberry v. Pennsylvania*, (1971) 400 U.S. 455, 27 L.Ed. 2d 532, 91 S.Ct. 499, or who has been directly involved in the case, see *Morrissey v. Brewer*, (1972) 408 U.S. 471, 33 L.Ed. 2d 484, 92 S.Ct. 2593. Although acceptable in *Withrow, supra,* there have been other circumstances where the combination of investigative and judicial powers are unacceptable.

In Re Murchison, (1955) 349 U.S. 133 at 136, 99 L.Ed. 942 at 946, involved a state statute which gave the trial judge certain "grand jury" powers. The judge questioned a police officer, accused him of perjury, tried him for contempt, held the hearing himself and sentenced the officer for contempt. This court rejected that approach observing that if the same judge is allowed to hear the contempt charge and try it, then either the defendant is deprived of the right of cross-examination or is put to the spectacle of a judge determining the truth of his own testimony.

As with attorneys, it is not sufficient for judges to avoid actual misconduct. The American Bar Association *Canons of Judicial Ethics*, Canon 4, states in part that a judge's official conduct should be free from impropriety and *from the appearance of impropriety.* A similar provision has been adopted as the *California Code of Judicial Conduct*, Canon 2, which provides that a judge should avoid not only impropriety, but also should avoid *the appearance of impropriety* in all activities.

THE PROCEDURES ADOPTED BY THE STATE OF CALIFORNIA TO PROVIDE INTERIM JUSTICES PRO TEM RUNS AFOUL OF PROHIBITION AGAINST THE APPEARANCE OF IMPROPRIETY.

The *Constitution of the State of California*, Article VI, Section 6, gives the Chief Justice the power to "provide for the assignment of any judge to another court." The California Supreme Court has long held that the provision applies to the entire judicial system of the state, including the Supreme Court and, together with *California Rules of Court*, Rule 995, enables the Chief Justice to name interim judges to fill vacancies created by judges disqualified or unable to act, see *Fay v. District Court* (1927) 200 Cal. 522, at 528, 254 P. 896, at 899. Given the power to make an appointment, it is human nature to select a person who agrees with oneself, regardless of any actual bias.

I commissioned a computer study on Lexis to determine whether or not Chief Justice Bird's appointments actually tended to agree with her. As of February 24, 1982, there were twenty-six cases in which the word "Chief Justice Bird" appeared together with the words "under assignment by the chairperson of the judicial council" or "by assignment of the chairperson of the judicial council". The Wolfson case had not yet been added to the computer, but it made the twenty-seventh case. In those twenty-seven cases, Chief Justice Bird appointed a total of thirty-one interim Supreme Court Justices.

Of the thirty-one that she appointed, twenty-nine of them, or 93.5%, voted with her. The two who disagreed with her had not been reappointed as of the date of the study. In that group of cases, there were three decisions decided by a four to three vote in which the Chief Justice had appointed three interim justices. All three of the justices agreed with her. There were also three decisions decided by a five to

two vote in which the Chief Justice appointed a total of five interim justices. Four of the five justices in those decisions agreed with her. Thus, in close cases, seven out of eight of her appointments agreed with her.

In an article in 37 *Stanford Law Review* 433 entitled "The Selection of Interim Justices in California: An Empirical Study" the authors discovered that the situation was not unique to Chief Justice Bird. Chief Justices Gibson and Wright agreed with their interim justices 85% and 75% of the time respectively, while they agreed only approximately 50% of the time with the regular justices. At the time of the study, Chief Justice Bird had an agreement rate with her interim justices of 80% and an agreement rate with her regular justices of 46%. I did the February 1982 computer study before becoming aware of the Stanford Law Review article and I did not attempt to determine the Chief Justices' agreement rate with her regular justices through February 1982.

Only Chief Justice Traynor's agreement rate with interim justices was approximately the same as his agreement rate with regular justices, 32 *Stanford Law Review* 433, at 438. The authors of the law review article speculated that the low rate of agreement resulted from his practice of repeatedly assigning retired Associate Justice B. Rey Schauer to fill vacancies even though they disagreed on most legal issues.

The article points out at page 439 that, "If Chief Justices assign judges likely to vote with them, or if the public, rightly or wrongly, perceives that this happens, the court's reputation for impartial adjudication could be damaged."

I cannot state it any better than the conclusion of the Stanford Law Review article which provides,

> "The current method of filling temporary vacancies on the Supreme Court invites the appoint-

> ment of interim justices likely to vote for the position of the appointing justice. Such a practice risks bias in the particular case and threatens the court's reputation for impartiality. The benefits realized by such appointments—final resolution of legal issues and review of lower court decisions —are largely illusory because the appointed justices vote matters in only a very few cases."

The California Supreme Court recognized that fact itself in *Mosk v. Superior Court*, (1980) 25 Cal. 3d 474 at 486, 159 Cal.Rptr. 494 at 502, when it observed that it is appropriate for justices pro tem to be selected by lot in order to avoid charges of bias, prejudice or favoritism. The concern is not simply for the existence of bias, but also for the appearance thereof.

In the present case, Justice White was appointed as an interim justice to replace Justice Kaus who disqualified himself since he had participated in the Court of Appeals decision which affirmed the trial court decision. Justice Tobriner was appointed as an interim justice to fill the vacancy created by his own retirement.

Thus, two members of the five member majority had been appointed as interim justices by the questionable procedure described above. *California Constitution*, Article VI, Section 2, requires the concurrence of four justices who participated in oral argument in order to arrive at a decision. Eliminating the two interim justices also reduces the majority below that necessary for a decision.

We are aware of Justice Rehnquist's opinion denying a Motion to Recuse himself made on the grounds that he had earlier expressed an opinion on the subject matter, *Laird v. Tatum* (1973) 409 U.S. 824, at 838, 93 S.Ct. 7, at 16, 34 L.Ed. 2d 50, in which he stated that nothing guarantees a litigant that each judge will start off from dead center in

his willingness or ability to reconcile opposing arguments with his understanding of the Constitution and the law. While this may not violate the Constitution as to any individual justice who is willing to listen not only to the arguments of counsel, but also to the discussion of other justices with differing points of view, it is disasterous for a litigant if all of the justices share the same point of view.

A panel of seven Supreme Court Justices creates the opportunity for a cross-section of opinion and gives the litigant the opportunity to have a panel which is, on balance, impartial, even if individual members may have a predilection one way or the other. Hopefully, the predilections of the various individual members of the panel will offset each other.

With a manner of appointment of interim justices such as that in the California Constitution, the litigant's chances of a panel with offsetting biases are reduced. For example, in this case, it was argued for the first time in March or April of 1980. The panel remained unchanged for nearly a year, but was unable to reach a decision in this case.

Then Justice Wiley Manuel passed away and Justice William Clark resigned to join the Reagan administration in Washington. Although Justice Manuel's opinion is not known to the litigants at this time, Justice Clark had voted against granting a hearing on the issue and presumably favored the affirmance of the trial court decision.

For several months the five member court was also unable to reach a decision. We know now that Justices Richardson and Mosk favored affirming the trial court decision while Chief Justice Bird and Justices Newman and Tobriner favored the reversal.

When the new vacancies were filled, one of the new justices was Otto Kaus who had participated in the court

of appeals decision which affirmed the trial court decision. He disqualified himself, presumably because he had already expressed an opinion on the case through the Court of Appeals decision. Chief Justice Bird replaced him with Justice White who had previously voted with her in other instances when he had been appointed an interim justice.

The case was reargued in August of 1981, nearly a year and a half after the first oral argument. Before the decision was filed, Justice Tobriner resigned. Nevertheless, Chief Justice Bird appointed him to write the opinion under her authority as chairperson of the Judicial Council, *California Rules of Court*, Rule 995. Thus, this was a close case which took nearly two years after initial oral argument to decide. It seems quite possible that if Justice Manuel had survived and if Justice Clark had not resigned, the decision would have been four to three in favor of affirming the trial court. Instead, with the Chief Justice given the opportunity to name two interim justices who sided with her, as have more than 93% of the interim justices she has appointed, they reached the decision to which this petition is directed. Major issues of law should not be decided by such fortuitous events.

The method of appointing interim justices is particularly dangerous when we realize that it is subject to none of the checks or balances involved in the selection and appointment of regular justices. An interim justice needs no approval of the Judicial Council, cannot be recalled for misconduct and need not obtain the approval of the voters that is required of the other justices. Thus, the power to appoint interim justices is the unbridled power to influence the outcome of the case. It defeats the guarantee of a fair tribunal which resides in the Fourteenth Amendment due process clause.

II.

THE DECISION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA VIOLATED THE GUARANTEES OF DUE PROCESS AFFORDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (A) BY ENUNCIATING ONE STANDARD OF INTERPRETATION FOR A STATE PENAL STATUTE, BUT APPLYING A DIFFERENT AND VAGUE STANDARD TO THE FACTS OF THIS PARTICULAR CASE AND (B) BY IGNORING THE FACTUAL FINDINGS OF THE TRIAL COURT AND DECIDING THE CASE BASED UPON EVIDENCE NOT PRESENTED AT TRIAL AND WITHOUT GIVING THE PETITIONER THE OPPORTUNITY TO CROSS-EXAMINE.

(Perspective)

Before discussing the details of this section, it will be useful to review certain decisions of the federal courts concerning age discrimination, certain state statutes which prohibit discrimination based upon age and the decisions of several of the state courts. Once these factors have been considered, it will become readily apparent that the decision of the California Supreme Court is an aberration which is made possible only by ignoring the procedural due process guarantees afforded by the Fourteenth Amendment.

I have been unable to find any decision of this court which directly considers the question of age discrimination in housing. There are two decisions by which this court has expressed its opinion that age is an appropriate basis for classification and does not constitute arbitrary discrimination. In *Brown v. Board of Education* (1954) 347 U.S. 483 at 494, 98 L.Ed. 2d 873, 880, 74 S.Ct. 686,

this court stated,

> "To separate (children) from others *of similar age and qualifications* solely because of their race generates a feeling of inferiority as to their status in the community. . ." (Emphasis added.)

This court has also found that age is not a suspect classification in *Massachusetts Board of Retirement v. Murgia* (1976) 427 U.S. 307. Thus, this court has regarded age as an appropriate, *non-arbitrary* form of discrimination.

Decisions of the Circuit Courts of Appeal have confirmed that opinion, at least by inference. In *Wharton v. Knefel* (8th Cir. 1977) 562 F. 2d 550, the court found that a lessor had engaged in racial discrimination despite her contention that her refusal to rent to a black renter was based on her preference not to rent to divorced people with teenagers. Apparently, the court would have permitted discrimination against people with teenagers, but rejected it in that case as a subterfuge for racial discrimination.

In *Smith v. Adler Realty Co.*, (7th Cir. 1971) 436 F.2d 344, the court found that a stated policy of excluding children was actually an excuse designed to avoid the appearance of illegal racial discrimination. In rejecting the excuse, the court apparently did so only because it found the excuse to be untrue. If either of these circuit courts had believed that age-discrimination was improper, they could have said so rather than stating that the excuses were an attempt to avoid charges of racial discrimination.

I have found only two circuit court decisions which directly deal with the issue of age-discrimination in housing. *Joy v. Daniels* (4th Cir. 1973), 479 F.2d 1236, deals with a low income housing rent supplement program and observes, in dicta, that an apartment owner in such a program may not discriminate against any family because

of children by reason of 24 *C.F.R.* 221.536 (1971). There is no contention made that petitioner here is providing low income or rent supplement housing.

The other case is *Halet v. Wend Investment Company*, (9th Cir. 1982) 672 F.2d 1305, 1311, which reversed a dismissal of an action which alleged that the exclusion of families with children interfered with the plaintiff's ability to raise a family. Respondent made a similar argument in this case, but the trial court rejected all findings of fact proposed on the issue by the Wolfsons as unproved, specifically finding that there are apartments available which rent to families with children.

Thus, those decisions of the circuit courts of appeal and of this court which have touched upon the subject of age discrimination have indicated that age discrimination is *not* an arbitrary or invidious form of discrimination unless specifically prohibited as in low income housing programs, unless the tenant shows that the "age discrimination" is actually a subterfuge for racial discrimination, or unless the tenant shows that the age discrimination has some other effect, such as producing racial discrimination or interfering with a family's ability to have children at all. None of those circumstances apply to the present case and, to the extent that the defendants made allegations concerning those matters, they were unable to prove them as established by the trial court's rejection of their proposed findings of fact and conclusions of law. I did not attempt to determine whether any district courts had considered the issue.

A number of state courts have considered the issue and concluded that age discrimination in housing or the exclusion of families with children from rental housing is reasonable. Those decisions include the Florida Supreme Court in *White Egret Condominium, Inc. v. Franklin*, (1979) 379 So. 2d 346, the Ohio Supreme Court in

Lamont Building Company v. Court, (1946) 70 N.E.2d 447, the Arizona courts, *Riley v. Stove* (1974) 256 P.2d 747, and the New Jersey courts in *Tax Payers Association, etc. v. Weymouth Township* (1976) 364 A.2d 1016, and *Shepherd v. Woodman Township Comm'n, etc.* (1976) 364 A.2d 1005.

There are ten state statutes which either prohibit discrimination based upon age or which prohibit the exclusion of families from rental housing for the reason that there is a child in the family. Those statutes are *Arizona Revised Statutes*, § 33-1317, *Connecticut General Statutes Annotated*, § 46a-64, *Delaware Code*, Title 25 § 6503, *Illinois Annotated Statutes*, Chapter 80 § § 37-38, *Massachusetts Annotated Law*, Chapter 151B, § 4.11 and § 4.6, *Michigan Compiled Laws Annotated*, § § 37.2102, 37.2302, 37.2502, *Montana Revised Codes Annotated*, 49-2-305, *New Hampshire Revised Statutes Annotated*, § 354-A:8V, *New Jersey Statutes Annotated*, 10:5-4, *New York Real Property Law*, § § 236 and 237.

I have found no challenges to the state statutes which prohibit age discrimination, but presumably each was adopted by the local legislature after determining that there was a problem which could be solved by such a statute. In the present case, no such statute exists. As discussed in the statement of facts, the Unruh Act has been interpreted to prohibit all arbitrary discrimination. In 1971, a California court found that age discrimination in housing was not arbitrary, *Flowers v. John Burnham & Company* (1971) 21 Cal.App. 3d 700, at 703, and approved the exclusion of a particular class of children, boys over five. After *Flowers*, the legislature amended the Unruh Act to prohibit discrimination based upon sex, but made no mention of prohibiting discrimination based upon age.

In fact, several bills were introduced in successive legislatures to attempt to prohibit age-related discrimin-

ation in housing. Each and every one of those bills failed of passage. Thus, the California Supreme Court is the only court in the nation to find age discrimination in housing to be arbitrary in the absence of a prohibiting statute or regulation and in the absence of any finding that the age discrimination was a subterfuge for some prohibited type of discrimination. It has reached this result only by ignoring its usual rules of appellate review and riding roughshod over the procedural due process guarantees which are necessary to produce a fair trial in a fair tribunal.

A. (The California Supreme Court Has Enunciated One Definition Of "Arbitrary" But Has Applied A Different Definition To The Facts Of This Case And Has Made A Penal Statute Too Vague To Satisfy Due Process Requirements.)

Earlier interpretations of the Unruh Act prohibited all forms of *arbitrary* discrimination. At page 20 of its slip opinion, the majority indicated that the public accomodations statutes have uniformly proscribed exclusions "on the basis of purely *arbitrary* classifications." (Emphasis added.)

Near the bottom of page 20 of the slip opinion, the majority speaks of the legislative confirmation of the court's interpretation of the Unruh Act as "barring all forms of *arbitrary* discrimination" (Emphasis added). It finds this legislative approval from a 1974 amendment to the Unruh Act which was made after *In Re Cox*, 3 Cal. 3d 205, 90 Cal.Rptr. 24, which held that the Unruh Act barred all forms of arbitrary discrimination.

The Court then announces at page 21 of its slip opinion the "well-established principle" of statutory construction that a legislative amendment of a statute without altering

portions of the provisions that have already been judicially construed, there is a presumption that the legislature has been aware of and acquiesed in the previous judicial construction. Yet the 1974 Amendemnt of the Unruh Act also came after the decision of the court of appeals in *Flowers v. John Burnham Company,* (1971) 21 Cal.App. 3d 700, 98 Cal.Rptr. 644, which expressly approved age discrimination in rental housing.

If a court follows a rule of statutory construction when convenient to the decision it wishes to reach, but ignores the same rule of statutory construction when inconvenient, the litigant involved has been denied procedural due process. If the legislature must be presumed to be aware of the court's decision in *Cox* prohibiting all forms of arbitrary forms of discrimination, it must have also been aware of the appellate court's decision in *Flowers* holding that age discrimination was not arbitrary. Indeed, if we follow the definition of "arbitrary" enunicated even in Wolfson, we find that the California Supreme Court applied a different definition to the facts of this case.

As recently as *Cox* the California Supreme Court observed that a reasonable classification having a substantial relation to a legitimate objective under a sufficiently definite standard is reasonable, *In Re Cox,* 3 Cal. 3d at 215, fn. 9 (in connection with a discussion of equal protection). Later in the decision, the majority made it clear that there can be reasonable classifications, including age-restrictive classification in connection with housing for the elderly. The majority did not overrule *Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal. 3d 736, 13 Cal.Rptr. 201, 361 P. 2d 921, which approved as reasonable a California Horse Racing Board Regulation which prohibited persons who had been convicted of bookmaking from participating in any pari-mutuel wagering, although this case was specifically called to the Court's

attention. Nothing in the California Supreme Court opinion holds that the Unruh Act requires a classification to be perfect, only that it be one which promotes a legitimate objective.

Yet, when it nears its conclusion, the majority states at page 37 of the slip opinion that,

> "Marina Point cannot possibly claim that its exclusionary policy serves any similarly *compelling societal interest.*" (Emphasis added.)

If Marina Point has a legitimate objective and if the means which it has adopted is reasonable related to that objective, then its conduct is not arbitrary. If the California Supreme Court wishes to adopt a strict scrutiny interpretation of "arbitrary" as used in the Unruh Act, then it should do so clearly. It should not be allowed to announce a rational relationship test and then find that a litigant failed to satisfy a strict scrutiny test. To do so deprives that litigant of fundamental due process.

The majority also created an intolerably vague penal statute when it excluded housing for the "elderly" from the general prohibition against age discrimination. The Massachusetts statute described above defines elderly as over sixty-five; the Michigan statute defines senior citizen housing as being fifty years of age or older, *Michigan Compiled Laws Annotated,* § 37.2503(1)(c). Despite a statute which prohibits age discrimination in public accomodations and in real property, the New Jersey court has approved a municipal ordinance which permitted a mobile home park to be limited to a family in which the head of the household or spouse was fifty-two years of age or older, *Taxpayers Association of Weymouth Township v. Weymouth Township,* (1976) 71 N.J. 249, 364 A. 2d 1016, cert. den. 430 U.S. 977, 52 L.Ed. 2d 373, 97 S.Ct. 1672. The volume containing the Illinois statute was

missing from the library during the time of my research for this matter and I am uncertain as to its provisions, but it was not cited in Shephard's in any federal case.

Thus an apartment owner may maintain housing for the "elderly" if able to figure out what that is. A wrong guess subjects the owner to the penal provisions of *California Civil Code*, § 52, which provides for treble damages. An apartment owner is not told the age at which he may begin excluding infants. If he begins at fifty and a court later holds that that is too young to be considered elderly, then the owner is subject to the penal provisions of the act.

> "That the terms of the penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. (Citations)" *Connally v. General Construction Company* (1965) 269 U.S. 385, at 391, 70 L.Ed. 322, at 328, 46 S.Ct. 126.

B. (The California Supreme Court Decided The Case By Ignoring The Factual Findings Of The Trial Court And By Relying Upon Evidence Not Presented To The Trial Court, Without Giving Petitioner The Opportunity To Cross-Examine.)

Even assuming that the California Supreme Court has properly enunciated a strict scrutiny standard for Unruh Act review, or a standard which precludes any classifica-

tion for businesses subject to the Unruh Act, it could not reach its decision except by ignoring the findings of the trial court and by relying upon evidence which was never introduced at the trial. This violates due process both by applying a unique set of rules for appellate review to this case and by denying petitioner the opportunity to cross-examine the evidence upon which the Supreme Court relied in reaching its decision.

The most egregious example of this occurs at page 38 of the slip opinion, wherein the majority concludes that the exclusion of children somehow exacerbates the state's housing problems. Such findings were requested by the Wolfsons, but rejected by the trial court. Indeed the testimony of witnesses for both the Wolfsons and the petitioner agreed that requiring apartment owners to rent to families with children would be a form of governmental regulation which would reduce the desirability of building additional rental units and would therefore exagerate any housing shortage which may exist. This testimony was dismissed at oral argument by one of the majority justices who said something to the effect that expert opinion should be disregarded since experts can be found who will testify to anything.

Such an attitude illustrates the utter disregard that the majority have for the fact finding process. The normal rule is that where there is conflicting evidence, all doubts shall be resolved in favor of the trial court's decision. It is the prerogative of a trier of fact to refuse to believe witnesses. Where two or more inferences can reasonably be deduced from the facts, the trial judge may draw such inferences as may be reasonable to him and the reviewing court is without power to substitute its deductions for those of the trial court, *In Re Marriage of Mix*, (1975) 14 Cal. 3d604, at 614, 122 Cal.Rptr. 79, at 85-86, 536 P. 2d 479, *Greening v. General Air Conditioning Corporation*, (1965) 233 Cal.App. 2d 545, at 550, 43 Cal.Rptr. 662.

The California Supreme Court simply ignored the factual findings of the trial court that the petitioner had a legitimate objective, the preservation of its property and a peaceful and quiet environment and that the exclusion of children was rationally related to that objective. The Supreme Court found instead that the petitioner had no compelling societal interest in excluding children, in part because such an exclusion would exacerbate the state's housing problems despite the fact that the trial court had rejected similar findings requested by the Wolfsons and despite the fact that the testimony of witnesses for both the petitioner and the Wolfsons agreed that requiring apartment owners to rent to families with children would exacerbrate whatever housing shortage may have existed at the time.

Moreover, the majority went beyond the evidence introduced at trial in reaching its decision. At pages 10 and 11 of the slip opinion, the court described certain studies which "revealed" that families with children are excluded from sixty to eighty percent of the available rental housing. None of those studies were introduced at the time of trial and the petitioner has never had the opportunity to cross-examine the authors of those studies with the exception of two authors of a single study who testified at the trial. The trial court rejected proposed findings by the defendant based upon the testimony of those two authors.

The majority also relies upon a series of law review articles. Although the trial occurred in the Fall of 1977, the earliest law review article was published in June 1978. The *Loyola University of Los Angeles Law Review* article reveals at footnote 14 that the author's statistics came in part from a telephone interview with Messrs. Wolfson and his attorney Gratz, as well as other people opposing adult-only housing. The law review article does not report any attempt to interview anyone who might present the petitioner's point of view.

In Gerald Travalio's article, 40 *Ohio State Law Journal No. 2*, 295 at 296, he stated that he intended to examine the *Federal Constitutional* aspects of age-restricted housing. He began his article by acknowledging that, "while it will become apparent. . .that certain empirical data are necessary to the legal result, *I have made no effort to acquire that data* for purposes of this article.. . ." (Emphasis added.) Mr. Travalio acknowledged that the shortage of rental housing available to families with children is an assertion and then discussed the asserted facts as though proved. Although nominally not deciding the case on the basis of federal constitutional issues, the court relied on these unverified facts in writing its opinion.

If an appellate court can consider any fact it wishes, regardless of whether or not it has been introduced into evidence, the court can produce any result which it desires. If a litigant can be precluded in this fashion from cross-examining witnesses, that litigant will be deprived of any opportunity to test the credibility of the witnesses, their bias or other improper motives. In short, by going beyond the record at trial, the majority has deprived petitioner of one of the most important safeguards of the integrity of the fact-finding process in the form of the right of cross-examination, an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal, *Pointer v. Texas* (1965) 380 U.S. 400, at 405.

CONCLUSION

During oral argument of a post Supreme Court decision motion, counsel for the Wolfsons observed that,

> "Justice Tobriner fell out of his chair to avoid mentioning the federal constitution. As fas as he was concerned it did not exist."

That is as near an exact quote as memory permits, but the gist of it is certainly accurate. It also summarizes accurately what is wrong with the majority's opinion; it ignores the Constitution of the United States and the procedural safeguards which are afforded to litiants by the Fourteenth Amendment due process clause.

A civil litigant is no less entitled to procedural due process than a criminal defendant. This means, at a minimum, that the state Supreme Courts should decide cases based upon the facts in the record where the parties have had the opportunity to conduct cross-examination of witnesses and to respond with rebuttal testimony. If an appellate court can rely upon studies made after the trial, ignore the testimony of witnesses for both parties and pretend that the trial court findings were never made, the court can reach any predetermined result which it desires.

The problem is exacerbated by, or perhaps caused by, the provisions of the California Constitution which provide for the appointment of interim justices to fill temporary vacancies. The Chief Justice can, and usually does, name interim justices to fill temporary vacancies. The Chief Justice can, and usually does, name interim justices who are likely to agree with her. This results in a panel which is far more likely to have several members with the same preliminary biases than a panel which has been selected by the usual procedures. All of these have combined in this case to deprive petitioner of a fair trial in a fair tribunal and justifies the issuance of a Writ of Certiorari in this case.

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Respectfully submitted,

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